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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1736~~ 70-194

MICHAEL VINCENT CATALANO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

MICHAEL VINCENT CATALANO, Petitioner,

against

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Michael Vincent Catalano,* respectfully prays that this Court issue a Writ of Certiorari to the United States Court of Appeals, Second Circuit to review the judgment and order of that Court which affirmed the judgment of the United States District Court for the Southern District of New York convicting the petitioner of the crime of Conspiracy (18 U.S.C. §371) after trial before McLean, D.J., and a jury.**

* Another co-defendant herein, Martin Goldman, has also filed a Petition for Certiorari with this Court and Catalano adopts Goldman's arguments as well.

** The indictment herein contained four counts in all: one charging a conspiracy to violate 18 U.S.C. 1952; another a conspiracy to participate in extortionate means to collect an extension of credit in violation of 18 U.S.C. 894; and two charged violations of 18 U.S.C. 1952. The trial Court dismissed the conspiracy to violate Section 894 and the jury acquitted on the violations of 1952.

Opinion Below

The opinion of the Second Circuit, not yet officially reported is reprinted as an appendix to this Petition (App. B).

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U.S.C. 1254(1). The Circuit Court affirmed the judgment of conviction on March 17, 1971 and a timely motion for rehearing was made. That was denied on April 20, 1971. On May 11, 1971, the Second Circuit also granted a Stay of Mandate to the co-defendant and co-petitioner, Martin Goldman. The orders of the Court below are annexed, and appear in the appendix.

Questions Presented

1. Whether an indictment may be based and founded on hearsay, especially when better evidence was available?

2. Whether an indictment is valid if voted by a grand jury which heard only the hearsay reading of testimony of the Government's principal witness given before a different grand jury which had not voted an indictment.

3. Ought the rule of *Costello* v. *United States* permitting hearsay indictments be overruled once and for all?

4. Whether the evidence at trial was sufficient as a matter of law to convict, especially in view of the fact that the jury acquitted of the two substantive counts and the Court dismissed a third count which also charged a conspiracy?

Constitutional and Statutory Provisions Involved

The Fifth Amendment due process clause is involved. 18 U. S. C. §§ 894; 1952 and 371.

Statement of the Case

That this case is unusual and singular is an understatement since the opening paragraph of the opinion of the Circuit Court declares *(inter alia):*

> "The background of this case presents a most bizarre tale of international commercial intrigue. However, for the purposes of our decision, it is not necessary to narrate the full script, which is suitable for the cinema or for television."

The evidence was viewed by this Court in a light most favorable to the Government and indicated in that context that co-defendant Martin Goldman allegedly entered into a joint venture with one Williams and Flax to obtain a large quantity of platinum below the market price with a view towards selling it for a large profit.

In order to finance this venture, Goldman obtained a loan of $100,000.00 through a corporation of which he was a vice-president. Each of the co-adventurers allegedly agreed to be liable for $33,000.00. The $100,000.00 had in essence been loaned to this trio by Sam Goldman, who was co-defendant Martin Goldman's father. The loan was to be repaid out of the receipts from the resale of the platinum together with a percentage of the profits.

At this juncture it is important to note that the case turned upon the testimony of a single witness, Williams, (tt. 6/10/70, p. 4).

Following a skein of frustrating negotiations, a purchase was arranged, and, supposedly, Williams was sent to San

Diego to take delivery. Goldman subsequently arrived in California with petitioner Catalano.

Apparently Goldman embarked upon the platinum deal in good faith and relied upon Williams' assurances that he had checked with the Departments of Justice and Commerce and had been advised that the deal would be legal if properly documented. It appeared that the deal was to be for "cash" and Catalano was retained in the capacity of "bodyguard" for Williams.

In April of 1968 Williams (Henry Williams III), together with Flax, Martin Goldman, and an attorney, Arthur Singer (really Sam Goldman's lawyer), journeyed to California to negotiate the platinum transaction (29A). Following a meeting concerning the negotiations for the transfer of the platinum, the foursome returned to their hotel room in California where Williams, the principal Government witness, met petitioner Catalano for the first time. Brook Hoyt, a Government witness who was also at this meeting, testified that Catalano had been introduced to him as well and was described as a friend of Martin Goldman's. It appears that Goldman had advised Williams that Catalano was there to protect Williams and that he should not fight with him. Williams declared that he was fearful of Catalano from that time on, although the record is void and vacant, up to that time, of any threats allegedly uttered by Catalano (37A, 38A).

It appears that Williams made the final contact with the purported Mexican seller but was tricked out of the $100,000.00 in cash when the supposed seller suddenly vanished with the money.

Before leaving San Diego, Catalano told Williams that the latter was still liable to Goldman for $33,000.00 of the stolen funds. After the return of the parties to New York Williams alleged that Catalano assaulted him and gave him a deadline within which he was to deliver $33,000.00 to Gold-

man. As has already been noted, Count 1 of the indictment, which charged with reference to the first meeting in New York City, that the appellants caused the illegal travel of Williams with the intent to extort money from him in violation of Section 1952 of Title 18; and Count 2, which charged interestate travel with intent to extort in regard to the New Jersey meeting, were both removed from the case by virtue of a jury's acquittal. Count 3 had been dismissed by the Trial Judge before submission to the jury. That charge involved a conspiracy to violate 18 U.S.C. 894. Thus, the only conviction was for the alleged conspiracy under Count 4.

The Indictment

The indictment voted by the Scurthern District grand jury charged petitioner and co-defendant Goldman with the following four counts: (1) with intent to extort, causing Williams to travel between New Jersey and New York on or about May 10, 1968, in violation of 18 U.S.C. §§ 1952 and 2; (2) with intent to extort, traveling from New York to New Jersey on or about June 20, 1968 in violation of 18 U.S.C. §§ 1952 and 2; (3) conspiring to collect an extension of credit by extortionate means, in violation of 18 U.S.C. § 894; and (4) conspiring to intend to commit an extortion, using the telephone in interstate commerce, in violation of 18 U.S.C. § 371. The fourth count alleged five overt acts, four of which were acts of arranging and holding of the meetings alleged in counts one and two; the remaining overt act alleged a meeting in California, outside of the Southern District of New York, and before Williams had lost the $100,000.

The Verdict

The trial court dismissed count three at the end of the Government's case. The jury acquitted petitioner and Goldman on counts one and two, and found them guilty on

count four, the conspiracy count. Petitioner was sentenced to a one-year term of imprisonment.

Grand Jury Presentation in the Eastern District of New York

In March 1969, Williams testified about the foregoing events before a grand jury in the Eastern District of New York, which never voted an indictment.

Grand Jury Presentation in the Southern District of New York

On December 2, 1969, the Government unexplainedly represented the same matter to a grand jury in the Southern District of New York. But, instead of having Williams appear and testify in order to permit the Southern District grand jury to make its own appraisal of Williams' testimony, the Government merely had the grand jury reporter from the Eastern District identify the transcript of the testimony Williams had given in that other grand jury. The prosecutor then read this transcript to the grand jury. Based solely on this hearsay evidence, the grand jury voted the indictment against petitioner.

The Government offered no reason for its failure to obtain an indictment from the Eastern District grand jury. With regard to its failure to call Williams as a witness in the Southern District grand jury, the Government merely represented that it had been advised that Williams was "unavailable" on the day in question (December 2, 1969), and that an agent had "attempted to reach" Williams at his residence "on several occasions prior to 2 December 1969 but was unable to reach him." The Government did not, however, attempt to reconcile these representations with the undisputed facts that the Government had no problem in producing Williams as a witness in November 1969 (at the Eastern District grand jury), in February 1970 (to testify in California), and in June 1970 (when he testified at the instant trial).

Reasons for Granting the Writ

As hereinafter shown, several bases for granting certiorari are found in the various issues raised by this petition: conflict among and within the circuits and district courts; important questions not yet finally determined by this Court; and conflict with an applicable decision of this Court.

1. The decision below, sustaining an indictment based solely on hearsay evidence before the grand jury, raises an issue on which many conflicting decisions have been written by circuit and district courts; these conflicts suggest the need for this Court to settle this important question of constitutional and criminal law.

Fifteen years ago, this Court in *United States* v. *Costello*, 350 U. S. 359 (1956), held that an indictment was valid, although the grand jury heard only hearsay testimony by agents, summarizing complex financial records and other evidence. Since that decision, and in light of the trend of this Court's opinions on criminal law, substantial question has been raised as to the scope of the *Costello* ruling and even its continued vitality.

Several decisions have criticized the use of only hearsay evidence to obtain an indictment. Thus, in *United States* v. *Umans*, 368 F. 2d 725 (2d Cir. 1966), *cert. granted*, 386 U. S. 940, *cert. dismissed as improvidently granted*, 389 U. S. 80 (1967), the Second Circuit, while sustaining the indictment, expressly referred to the "excessive use of hearsay" as "destroy[ing] the historical function of grand juries * * * and * * * the protection * * * that grand juries are supposed to afford * * *." *Id.* at 730. The Court therefore prospectively directed that "[h]earsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from

personal knowledge." *Ibid.* Shortly after *Umans,* Judge Weinstein, in *United States* v. *Arcuri,* 282 F. Supp. 347 (E.D.N.Y. 1968), held that all future indictments would be dismissed "without a showing of prejudice to the defendant if it is clear that hearsay alone was deliberately relied upon when better evidence was readily available for presentation to the grand jury." *Id.* at 351. The Second Circuit affirmed, 405 F. 2d 691 (1968), specifically noting, and quoting with implicit approval, Judge Weinstein's prospective ruling. Thereafter both the District Court for the Southern District of New York and the District Court for the District of Rhode Island, adopted the same prohibition in those courts. *United States* v. *Filippatos,* 307 F. Supp. 564 (S.D.N.Y. 1969); *United States* v. *Gramolini,* 301 F. Supp. 39 (D.R.I. 1969). The *Filippatos* decision made the prohibition applicable to all indictments filed after December 9, 1968 in the Southern District of New York—a date long before the instant indictment was returned.

Other holdings in the same and different circuits, however, conflict with these decisions. *E.g., United States* v. *Bracio,* 422 F. 2d 543 (7th Cir.), *cert. denied,* 398 U. S. 912 (1970); *Jack* v. *United States,* 409 F. 2d 522 (9th Cir. 1969). This conflict is compounded by a conflict within the Second Circuit itself. Thus, in *United States* v. *Leibowitz,* 420 F. 2d 39 (2d Cir. 1969), the court ruled that an indictment based solely on hearsay is valid unless "dismissal is required to protect the integrity of the judicial process." *Id.* at 42. In *United States* v. *Russo,* 413 F. 2d 432 (2d Cir. 1969), the court held that "a good reason not to call a particular witness"—*i.e.,* a threat on his life—sustains use of hearsay testimony before a grand jury (*id.* at 435). And, one month before the *Filippatos* proscription in the Southern District of New York against indictments based solely on hearsay, another judge in that court had held that *Costello* authorized such indictments. *United States* v. *DiLorenzo,* 49 F.R.D. 86 (S.D.N.Y. 1969).

In the instant case, no reason was offered for initially presenting Williams' testimony to an Eastern District of New York grand jury, for not obtaining an indictment from that grand jury, and for then suddenly seeking an indictment from a grand jury in another district. Further, no credible explanation was offered for the Government's failure to produce Williams to testify before the Southern District grand jury; the feeble and undetailed excuse of Williams' "unavailability" falls in the light of the Government's ability to produce Williams on other occasions shortly before and shortly thereafter. Indeed, the trial record suggests a reason—extremely prejudicial to petitioner—for the Government's unusual switch from one grand jury to another and subsequent refusal to produce Williams before that second grand jury. During Williams' direct examination at trial, he, at one point, confessed an inability to recall and requested and was granted permission to *read* the transcript of his grand jury testimony while answering questions at trial (A67-72). He also required recourse to his grand jury transcript during cross-examination (A228, A238). Such lapse of memory, if it had been permitted to have occurred in the Southern District grand jury, might have resulted in a no-true bill or, at the very least, substantial testimonial inconsistencies which could have been used to impeach Williams at trial.

In view of these facts, and the clear conflict among and within the circuits, this Court should resolve this issue, involving a procedure basic to our criminal law.

2. The affirmance below of petitioner's conviction, on the conspiracy count, despite its irreconcilable inconsistency with the jury's not guilty verdict on the substantive counts, raises an important question, involving a conflict among the circuits. In addition, substantial uncertainty exists on this subject of inconsistent verdicts in criminal cases which should be settled by this Court.

Approximately forty years ago, in *Dunn* v. *United States,* 284 U. S. 390 (1932), this Court held that a conviction may not be overturned because of an inconsistent verdict on another count in the same trial. That holding was logically required, according to the *Dunn* opinion, by the rule that *res judicata* could not be pleaded as a defense if the two counts had been separately tried.

Since then, however, that decision has been eroded and, indeed, disregarded, in line with the trend towards a more rational and logical criminal jurisprudence. In *Sealfon* v. *United States,* 332 U. S. 575 (1948), this Court *sub silencio* overruled the rule on which *Dunn* was based, by holding that a prosecution for a substantive offense was precluded by the defendant's acquittal on a previously-tried conspiracy indictment which amounted to "a determination favorable to [defendant] of the facts essential to conviction of the substantive offense." *Id.* at 578-79. Even where both the conspiracy count and the substantive count are tried together, and results in an acquittal on one count and a hung jury on the other, the Government is barred from retrying the defendant on the count on which the jury disagreed if the facts essential to a conviction on that count had been decided adversely to the Government as part of the acquittal on the other count. *Cosgrove* v. *United States,* 224 F. 2d 146 (9th Cir. 1954).

While the Second Circuit has repeatedly held, as here, that it will not disturb a *jury* verdict because of inconsistency, it has reversed verdicts *tried to the court* because of inconsistency. *United States* v. *Maybury,* 274 F. 2d 899 (2d Cir. 1960). Indeed, that court has suggested a non-jury conviction of one defendant is fatally defective if it is inconsistent with the acquittal of another defendant. *United States* v. *Wilson,* 342 F. 2d 43 (2d Cir. 1965); *United States* v. *Sells,* 325 F. 2d 161 (2d Cir. 1963).

The Fifth Circuit's decision in *Herman* v. *United States,* 289 F. 2d 362, *cert. denied,* 368 U. S. 897 (1961), conflicts

with the Second Circuit rule that inconsistency in a jury verdict is to be disregarded. In *Herman*, the Sixth Circuit reversed a conviction on a conspiracy count because it was inconsistent with the simultaneous acquittal on the substantive offense which was the only overt act supporting the conspiracy count. *Id.* at 368. *Accord: Hughes* v. *United States*, 95 F. 2d 538 (5th Cir. 1938).

The Second Circuit's disregarding of inconsistent jury verdicts is based solely on a legal fiction which cannot withstand analysis and, more important, makes a mockery of our criminal justice system. A defendant is no less prejudiced by an inconsistent verdict rendered by a jury than one announced by a judge; in fact, a judge's training and experience might suggest that his verdict be less scrutinized than that of an untrained jury which is more susceptible to emotional and time pressures. Likewise, in a jury trial, no meaningful reason exists for sustaining a conviction which is inconsistent with a simultaneous acquittal while holding that a jury disagreement on one count which is inconsistent with a simultaneous acquittal on another count is converted by *res judicata* into an acquittal. These serious questions, together with the conflicting view held by the Sixth Circuit warrant this Court's review.

The instant case affords a clear setting for this Court's determination of this issue of inconsistent verdicts by a jury. Petitioner was acquitted on counts 1 and 2 which charged travelling or causing another to travel in interstate commerce *with intent* to extort, in violation of 18 U.S.C. §§ 1952 and 2. Petitioner was convicted on count 4 which charged him with conspiracy to violate § 1952, *i.e.*, *conspiring to intend* to travel interstate to extort.

Since the proof of intent required for the substantive and for the conspiracy offenses is identical [*Ingram* v. *United States*, 360 U. S. 672 (1952); *United States* v. *Chase*, 372 F. 2d 453 (4th Cir.), *cert. denied*, 387 U. S. 907

(1967)], a finding of inconsistency in the jury's verdict depends on whether the acts alleged and proved in support of the substantive offenses were inextricably intertwined with the overt acts alleged in support of the conspiracy count. Here, they clearly were. The four relevant overt acts alleged in support of the conspiracy count,* merely allege the making of the telephone calls which induced the travelling alleged in counts 1 and 2, and the meetings for which the travelling was done. On the allegations and evidence in this case, a jury's rejection of the substantive charges precluded a finding of the existence of any one of the relevant overt acts.* This inconsistency of verdicts should not be permitted to remain.

3. The decision below conflicts with this Court's recent opinion in *Rewis* v. *United States,* 39 U.S.L.W. 4363 (April 5, 1971)** which held that a single or sporadic use of inter-

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* No identity need be shown as to overt act 1 in count 4 since it could not support a conviction on the conspiracy count. Overt act 1 alleged a meeting in the Southern District of California, outside of the Southern District of New York. Therefore, in view of the absence of evidence as to the situs of the alleged agreement, it cannot satisfy the requirement of an overt act within the district. *United States* v. *Williams,* 424 F. 2d 344 (5th Cir. 1970). Moreover, this alleged overt act occurred on May 1, 1968—*before* Williams had lost the $100,000; since the illegal intent was directed at Williams' repayment of one-third of that lost money, this intent, essential to a finding of conspiracy, could not have been formed until *after* the money was lost. *Cf. United States* v. *Boticello,* 422 F. 2d 832, 834 (2d Cir. 1970). Indeed, the trial court expressly instructed the jury that the "charges in this case which you are going to have to decide * * * occurred after that time". (Court's charge to the jury, Trial Transcript, p. 642.)

* Significantly, neither the decision below nor the Government's brief below even attempted to verbalize a rational reconciliation of the jury's verdict.

** This issue is raised for the first time here. *Rewis* was not decided until after the decision below in this case. In such circumstances, this Court may review a question not presented below. *Cf. Lawn* v. *United States,* 355 U. S. 339, 362 n. 16 (1957).

state travel for illegal activity, as alleged here, could not support a conviction for violation of § 1952. Rather, this Court explained, § 1952 "was aimed primarily at organized crime, and, more specifically, at persons who reside in one state while operating or managing illegal activities located in another." *Id.* at 4364. Legislative history of § 1952, relied on by this Court in *Rewis,* establishes that this statute was not designed to curtail "sporadic, casual involvement" in extortion, "but rather a continuous course of conduct sufficient for it to be termed a business enterprise." *Id.* at 4364 n. 6. The instant indictment charged only a single intended extortion; the Government's evidence at best only tended to establish a single extortion. Hence, the intervening decision in *Rewis* warrants this Court's review and reversal of the judgment below.

The Evidence at Trial Was Insufficient

One conspiracy charge herein alone survived the dismissal by the Court and the acquittal by the jury. A conspiracy can exist only when there is a substantive crime as the object thereof. Where no substantive crime has actually been committed, it appears that a conspiracy should also be dismissed. Conspiracies cannot be deemed to have existed *in vacuo.* The caution of Justice Jackson in *Krulewich* v. *United States,* 336 U. S. 440 is very apt in this regard (id. at 457):

> "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. *But statutes authorize prosecution for substantive crimes* for most evildoing without the *dangers to the liberty* of the individual and the integrity of the judicial process that are inherent in conspiracy charges . . . And I think there should be *no straining to uphold any conspiracy conviction* where [as herein] the purpose served by add-

ing the conspiracy charge seems chiefly to get *procedural advantages* to ease the way to conviction" (emphasis ours).

The Court noted in *United States* v. *Falcone,* 109 F. 2d 579, 581 (2 Cir. 1940), aff'd 311 U. S. 205 (1940):

> ". . . today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain and it is *only by circumscribing the scope* of such all comprehensive indictments that they can be avoided." (emphasis ours)

It is submitted that conspiracy has aptly been called "the darling of the prosecutor's nursery" because certainly in this case it appears to have been thrown in as a "catch-all" and it is difficult to believe that the jury really understood the charge contained in the conspiracy count. Even this Court found it necessary to wrestle with the apparent "inconsistency" in the jury verdicts.

Additionally, from the facts herein, it would appear that all four counts were so interwined that the acquittal on any one of them should have resulted in the dismissal of all. (*United States* v. *Cohen,* 197 F. 2d 26, 29, 3 Cir. 1952.)

This Court may, of course, note errors even without objection (Rule 52(b) F.R.Cr.P. and *United States* v. *Atkinson,* 297 U. S. 157, 160).

It appears that the Court below itself was troubled by the verdict in this case and by the "bizarre" facts which are "suitable for the cinema or for television".

Appendix A

Statutory Provisions

1. 18 U.S.C. § 2

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

2. 18 U.S.C. § 371

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

3. 18 U.S.C. § 1952

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Appendix B

Opinions Below

Opinion of the United States Court of Appeals for the Second Circuit, March 17, 1971

Nos. 35463, 35513

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL VINCENT CATALANO and MARTIN GOLDMAN,

Appellants.

Before:

WATERMAN, MOORE and FEINBERG,
Circuit Judges.

PER CURIAM:

The background of this case presents a most bizarre tale of international commercial intrigue. However, for the purposes of our decision, it is not necessary to narrate the full script, which is suitable for the cinema or for television. We therefore confine ourselves to the essential details of the case.

The evidence, viewed in the light most favorable to the Government, shows that the appellant Goldman entered into a joint venture with one Williams and one Flax to obtain a large quantity of platinum below the market price and to sell it for a large profit. To finance the venture Goldman obtained a loan of $100,000 through a corporation

of which he was vice-president, and each of the venturers agreed to be liable for $33,000. After a series of frustrating negotiations, a purchase was arranged, and Williams was sent to San Diego to take delivery. Goldman subsequently arrived in California with Catalano. As the seller insisted on a cash transaction, Catalano was to be Williams' bodyguard. Williams made the final contact with the purported seller, but was tricked out of the $100,000 in cash when that individual suddenly vanished with the money.

Before leaving San Diego, Catalano told Williams that Williams would still be liable to Goldman for $33,000 of the stolen funds, for Goldman was responsible for the $100,000 loan. After the parties returned to New York, Goldman allegedly arranged by phone for Williams to go from New Jersey to New York to discuss the loss of the money. At the alleged meeting Catalano, in Goldman's presence, assaulted Williams and delivered him a deadline within which the $33,000 would have to be paid. Later Goldman, by phone from New York, arranged another meeting with Williams in New Jersey at which Catalano in Goldman's presence again allegedly threatened Williams.

Appellants were tried on a four-count indictment, of which count 3 was dismissed at trial. Count 1 charged that with reference to the first meeting in New York City, the appellants caused the illegal travel of Williams with intent to extort money from him in violation of 18 U.S.C. §§ 1952 and 2. Count 2 charged interstate travel with intent to extort with regard to the meeting in New Jersey. Count 4 alleged a conspiracy to commit the substantive acts in counts 1 and 2 and alleged as overt acts the San Diego meeting, Goldman's two phone calls, and the two meetings alleged in counts 1 and 2. After a jury trial, both appellants were found to be not guilty on counts 1 and 2, and to be guilty on count 4.

Appellants contend that, because of their acquittals on counts 1 and 2, there was insufficient evidence to support

their convictions on count 4. Essentially this argument relies on the apparent inconsistency in the jury verdicts. However, under *United States* v. *Carbone,* 378 F. 2d 420 (2 Cir.), *cert. denied,* 389 U. S. 914 (1967), reversal is not necessarily required by inconsistent jury verdicts. Furthermore, we do not find any necessary inconsistency in these jury verdicts. Only one overt act was necessary to support the conspiracy conviction, and, without passing on whether the San Diego meeting was actually connected with the alleged conspiracy, it is evident that the jury could have reasonable doubts on some of the overt acts connected with the substantive counts and still have been convinced as to at least one overt act alleged in the conspiracy count.

Appellants' second contention is that the indictment should have been dismissed because it was founded on the hearsay reading of Williams's former testimony before another grand jury and because the Government's explanation of why Williams failed to testify in person before the indicting grand jury did not adequately justify the use of a transcript in lieu of a personal appearance. However, appellants have not surmounted *United States* v. *Leibowitz,* 420 F. 2d 39 (2 Cir. 1969), which acts as a limitation on the cases so carefully expounded in appellants' briefs. Here the grand jury knew that it was getting hearsay testimony and appellants have not shown "that there is a high probability that with eye-witness rather than hearsay testimony the grand jury would not have indicted." *Id.* at 42. See also *United States* v. *Rosenstein,* 434 F. 2d 640, 641 (2 Cir. 1970).

Appellant Goldman also asserts that the indictment was duplicitous in that in essence counts 1 and 2 charge subconspiracies already covered in count 4. While we agree that the proof of intent under 18 U.S.C. § 1952, see *United States* v. *Botticello,* 422 F. 2d 832 (2d Cir. 1970), might require proof of a conspiracy on counts 1 and 2 in this case, we cannot say that counts 1 and 2 are conspiracy counts. Counts 1 and 2 charge substantive offenses which extend

beyond an agreement between the appellants. Thus, even though the evidence may overlap on the substantive and conspiracy counts, the counts allege separate violations. See *Harris* v. *United States,* 359 U. S. 19, 23-24 (1959).

Affirmed.

Opinion of the United States District Court for the Southern District of New York, July 7, 1970

UNITED STATES *v.* MICHAEL VINCENT CATALANO and MARTIN GOLDMAN, 69 Cr. 893

The indictment in this case contained four counts. I dismissed Count 3 at the close of the government's case. The jury acquitted defendants on Counts 1 and 2, each of which charged violation of 18 U.S.C. Sec. 1952 and 2, and convicted them on Count 4, which charged a conspiracy to violate 18 U.S.C. Sec. 1952.

On the present motion to set aside the verdict, defendants argue that the acquittal on Counts 1 and 2, the substantive counts, demonstrates that the evidence was not sufficient to sustain the verdict on Count 4, the conspiracy count. In essence, they maintain that the conviction was inconsistent with the acquittal and hence cannot stand. Inconsistency of verdicts, however, is not a ground in itself for setting aside a conviction. The issue is whether the evidence was sufficient to support the verdict on the count on which the jury did find defendants guilty. I am satisfied that it was. Accordingly, this motion is denied.

Defendants also move to set aside the verdict on the ground that the indictment was based on hearsay testimony. It developed during the trial to the surprise of defendants and of the court, that the government had not called its principal witness, Williams, before the grand jury in this district which indicted defendants on December 16, 1969. Instead, the government called the grand jury reporter from the Eastern District, who identified his tran-

script of testimony which Williams had given before the Eastern District grand jury, which was then marked as an exhibit.

At my request, the government has filed affidavits setting forth the circumstances under which this was done. It appears from these that the presentation of this case to the Southern District grand jury was handled by a Special Attorney of the Organized Crime and Racketeering Section of the Department of Justice, referred to as the "Strike Force." He states that he read the testmiony of Williams given before the Eastern District grand jury verbatim to the Southern District grand jury. He further states that at the time he had been advised that Williams was "unavailable" to appear before the Southern District grand jury on the day in question, December 2, 1969. The affidavit of a Special Agent of the Federal Bureau of Investigation states that he had "attempted to reach" Williams at his residence "on several occasions prior to 2 December 1969 but was unable to reach him."

The Special Attorney's affidavit states that "no indictment was sought" from the Eastern District grand jury, for what reason does not appear. The evidence before the Southern District grand jury, apart from the transcript of Williams' testimony, would have been insufficient to justify an indictment.

In *Costello* v. *United States,* 350 U. S. 359 (1956), the Supreme Court upheld an indictment which was based solely on hearsay testimony. Since that decision, however, the practice of submitting hearsay evidence to the grand jury when competent evidence was available has several times been criticized by the Court of Appeals in this circuit.

> *United States* v. *Umans,* 368 F. 2d 725, 730 (2d Cir. 1966), *cert. dismissed,* 389 U. S. 80 (1967)
> *United States* v. *Catino,* 403 F. 2d 491, 496 (2d Cir. 1968), *cert. denied sub nom. Pagano* v. *United States,* 394 U. S. 1003 (1969)

United States v. *Arcuri,* 405 F. 2d 691, 692 (2d Cir. 1968), *cert. denied,* 395 U. S. 913 (1969)

I have found no case in which the Court of Appeals has actually dismissed an indictment or set aside a conviction on this ground. The reason for the court's critical dicta, particularly in *Arcuri,* appears to have been that the grand jury was misled into believing that testimony given before it was based on the first-hand knowledge of the witness, when in fact it was not. That is not the case here. Williams' testimony was given under oath, although before a different grand jury, and the Southern District grand jury was informed as to what had occurred.

Moreover, in the present instance, it appears that at least on the day when the evidence was presented to the Southern District grand jury, Williams was not available to testify in person. It would doubtless have been preferable for the prosecutor to have postponed the presentation of the case to the grand jury until a day when he could have secured Williams' presence. I do not feel, however, that his failure to make this precaution requires me to set aside this verdict in the circumstances of this case and in view of the general rule as laid down in *Costello.*

The motion is denied.

So ordered.

s/ EDWARD C. McLEAN
U.S.D.J.

Dated: July 7, 1970

Appendix C

Judgment of Affirmance of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of March one thousand nine hundred and seventy-one.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL VINCENT CATALANO, MARTIN GOLDMAN,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

R. DANIEL FUSARO
Clerk

Appendix D

Order Denying Rehearing but Granting Stay of Mandate

35463, 35513

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

Michael Vincent Catalano, Martin Goldman,

Defendants-Appellants.

(and another case).

A petition for a rehearing together with a motion in the alternative for a stay of mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant Michael Vincent Catalano,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied. The alternative prayer for a stay of our mandate pending an application for a writ of certiorari to the Supreme Court of the United States is granted pursuant to the provisions of Rule 41(b) FRAP. The petition to continue appellant Catalano on bail pending disposition of the certiorari petition is denied.

STERRY R. WATERMAN
Sterry R. Waterman

WILFRED FEINBERG
Wilfred Feinberg
Circuit Judges

April 20, 1971

Appendix E

Order Staying Mandate

35463, 35513

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of May, one thousand nine hundred and seventy-one.

United States of America,

Plaintiff-Appellee,

v.

Michael Vincent Catalano, Martin Goldman,

Defendants-Appellants,

(and another case).

It is hereby ordered that the motion made herein by counsel for the appellant Martin Goldman, by notice of motion dated April 12, 1971 to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari be and it hereby is granted.

STERRY R. WATERMAN
Sterry R. Waterman

Leonard P. Moore

WILFRED FEINBERG
Wilfred Feinberg Circuit Judges

May 11, 1971